UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
CHARLES STROUCHLER, SARA CAMPOS, by her next friend ANA SIMARD, and AUDREY ROKAW, by her next friend NINA PINSKY, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

NIRAV SHAH, M.D., as Commissioner of the New York State Department of Health, and ELIZABETH BERLIN, as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance, and ROBERT DOAR, as Administrator of the New York City Human Resources Administration/Department of Social Services,

Defendants.
---X

DECLARATION

Docket No. 12 CV 3216 (SAS)(GWG)

Leslie Salzman declares under penalty of perjury that the following is true and correct:

1. I am one of the attorneys for plaintiffs in this action seeking declaratory and injunctive relief to end defendants' policy and practice of reducing Medicaid personal care services when there has been no change in condition or circumstances to justify that termination. This declaration is in support of the motion for a temporary restraining order and preliminary injunction.

2. Named plaintiffs are disabled or elderly individuals who have been determined to need Medicaid-funded split-shift personal care services and who receive those services under either the general Medicaid personal care program, 18 N.Y.C.R.R. § 505.14, or under the consumer directed personal assistance program. 18 N.Y.C.R.R. § 505.28.

3. Effective October 4, 2011, State defendant modified its eligibility definition for Medicaid-funded split-shift home care services, 18 N.Y.C.R.R. § 505.14(a)(3), 18 N.Y.C.R.R. § 505.28(b)(4). At the time the emergency regulation was published, the State made two somewhat contradictory statements-- 1) the State anticipated "that most recipients currently authorized for continuous 24-hour personal care services will continue to receive that level of care…" and 2) "[t]he estimated cost savings for this portion of the regulations are $33.1 million." NYS Register, October 19, 2011 at 35-36, attached as Exh. A.

4. The state defendant noted that the change in regulatory language was not intended to be substantive. "As in the past, the consumer's need for assistance is not capable of being scheduled; that is, it occurs at times that cannot be predicted….This is not a substantive change from past practice. The only substantive difference from the prior definition of continuous services is that additional cases [those requiring continuous care for more than 16, but less than 24 hours] are now subject to the local professional director review and approval." 12 OHIP/ADM-1 at p. 4, attached as Exh. B. The Administrative Directive also explicitly provides that the definitions for "some assistance" and "total assistance" remain unchanged. Id.

5. Since the adoption of this regulatory modification, and the somewhat expanded role of the local medical staff, we have seen a significant increase in the number of reduction notices in split-shift cases. I have also received reports from other advocates in the City regarding recent increases in the number of calls from individuals who have been notified that the City is proposing to cut their split-shift services.

6. Those individuals authorized to receive split shift services are by definition those with the most severe conditions and greatest needs. It is distressing for them to receive baseless and irrational reduction notices and burdensome for them to follow through with the hearing process. Those recipients who have had the wherewithal to obtain counsel for their hearings, however, have almost uniformly received favorable decisions after administrative hearings. They have been burdened by the process, but are at least temporarily protected until the next assessment process. Those who have not been able to access the hearing process and who lose their services—will undoubtedly have experienced pain, possible injury and, in some cases, institutionalization.

7. When I attended the hearing for Mr. Strouchler in April 2012, Administrative Law Judge Mark Reid expressed frustration at the City's decision-making in these cases, and remarked on the record that "some would call this 'churning.'" This "churning," or the trimming of benefit rolls through attrition resulting from improper service reductions or terminations that are not appealed, is likely to occur when improper reduction notices are sent to a population of extremely vulnerable individuals. It is well-recognized that a small percentage of those individuals who receive reduction notices request hearings. *See, e.g.*, *Mayer v. Wing*, 922 F.Supp. 902, 909 n. 8 (1996) (citing 1996 testimony of the Deputy Director of the State Office of Administrative hearings that only 10-20% of those receiving reduction notices are likely to request a hearing).

8. Our client, plaintiff Charles Strouchler, presents an excellent example of defendants' completely arbitrary decision-making. Mr. Strouchler is a 68 year old former artist, who lives alone in an apartment in lower Manhattan. Mr. Strouchler's multiple sclerosis has

advanced to the point that he now has quadriplegia, limitations in respiratory functioning, and difficulty swallowing. As a result of these conditions he needs the assistance of a home attendant to perform all of his activities of daily living, ensure his safety and prevent any avoidable deterioration in his health status.

9. Mr. Strouchler has been receiving Medicaid-funded personal care services for many years. He currently receives his services through the consumer directed personal assistance program.

10. In 1997, Mr. Strouchler's services were increased from the sleep-in to the split-shift level because of his intensive nighttime needs. He has been receiving split-shift personal care since that time.

11. Mr. Strouchler requires significant nighttime assistance, including: 1) repositioning every two hours so that he does not develop bed sores which are susceptible to infection; 2) applying pressure and repositioning his arms and legs to help end the painful spasms he experiences in all of his limbs, 3) bladder catheterization; and 4) helping him dislodge any obstructions/secretions in his throat and lungs which he is unable to expel himself due to his difficulties swallowing. See, Medical Evidence, attached as Exh. C.

12. In August 2011, Local Medical Director Charles Levit recommended continuation of Mr. Strouchler's split shift services and those services were continued, as they had been for the prior 14 years. See, Fair Hearing Record documents, attached as Exh. D, pp. 1-2.

13. At the most recent re-authorization process, Mr. Strouchler's treating physician requested that his split shift services be continued. This time, however, LMD Levit decided that

Mr. Strouchler's services should be reduced to the sleep-in level because his needs were "predictable" and could be "scheduled." Exh. D, pp. 3-4.

14. In a notice dated February 23, 2012, the City proposed to reduce Mr. Strouchler's care stating that his "nighttime needs which involve turning/positioning and toileting are anticipated and can be scheduled." The notice went on to conclude that "therefore a mistake had occurred in your previous authorizations and you do not meet the criteria for continuous care." Exh. D, p. 5.

15. Mr. Strouchler appealed the City's determination and a hearing was held on April 9, 2012. Dr. Levit appeared at the hearing. Dr. Levit stated that the Local Medical Directors received an e-mail directive in October, 2011, instructing them that all split-shift cases were to be reviewed to see if the services could be reduced under the new regulation because the individual's needs could be "predicted."

16. While Dr. Levit testified that split-shift care should be given to individuals with "excessive" nighttime needs, and conceded that Mr. Strouchler's nighttime need for turning and positioning would meet his definition of "excessive," he determined that Mr. Stouchler was no longer eligible for split-shift care because his nighttime needs were "predictable."

17. When asked about the alleged "mistake" in the prior (14) authorizations of split-shift care, Dr. Levit testified that this was what he called a "regulatory mistake."

18. Mr. Strouchler received a notice from the fair hearing office informing him (without explaination) that they were re-opening his hearing and scheduling a new one. That hearing has not yet been scheduled.

19. Mr. Strouchler is a bright and sociable person. It is a source of great satisfaction to him that he is able to continue to live in his home, a situation that deeply enriches his life and allows him to maintain relationships with friends and loved ones in a way that would be difficult or impossible in an institution.

20. Another example of the City's arbitrary and irrational reduction policy is the case of another client, Irene Serrano—a 93-year old severely disabled recipient of split-shift home care services. She received a notice dated February 14, 2012, notifying her that the City would be reducing her care to live-in services because: "You can be more appropriately and cost-effectively serviced through sleep in services because your nighttime needs including repositioning [sic], toileting and transfer are infrequent and predictable…." See Excerpted Hearing Decision, p. 2, attached as Exh. E, p. 2.

21. In the Decision after Fair Hearing, pp, 9-11, Exh.E, pp. 3-5, the Commissioner found that the Agency was not able to identify a change that would justify a reduction to sleep-in services as the Agency did not even know the baseline of Ms. Serrano's condition on her prior assessment. Further, the ALJ rejected the LMD's proposal to schedule Ms. Serrano's nighttime toileting because she had learned about "evidence based best practices regarding scheduling of toileting," from "an [undated] article about their use in Texas," and this scheduling could be used to replace split-shift services. Exh. E, pp. 4-5. The Commissioner concluded that the Agency had also not shown that there was a "mistake" in a prior authorization. Rather, he determined that the Agency was simply suggesting "a proposal for a new plan" for Ms. Serrano and that there was no evidence that the new plan would be adequate. Exh. E., p. 4. Finally, the commissioner rejected the Agency's contention that repositioning was not a task included within the scope of

personal care services, as it was a long-standing practice to provide such care and was even included in the list of tasks in the Agency's own reduction notice to the client. Id.

22. I am also aware that split-shift recipients have been receiving multiple notices that are both conflicting and confusing.

23. For example Ms. G., received multiple inconsistent notices between December 2011 and January 2012. Ms. G. received a December 13, 2011 notice stated that her split-shift care would be continued through November 30, 2012; a second December 13, 2011 notice stated that her split-shift care would be reduced to sleep-in; a third notice dated January 30, 2012 authorized split-shift care for a time period to start several months in the future. See Ms.G. hearing documents, attached as Exhibit F, pp. 1-3.

24. Ms. G.'s daughter requested a fair hearing on December 27, 28 and 30, because she was unsure that the State had received her request and she was frightened that her mother's care would be cut. She first tried to make the request by telephone but could not get through to anyone, and then sent the request by fax, but continued requesting hearings because she could not get an acknowledgment of receipt from the State.

25. At the hearing, as an initial matter the ALJ refused to allow argument on the due process issue presented by the multiple, conflicting notices.

26. Additionally, at the hearing, the LMD explained that he reduced Ms. G.'s care to sleep-in based on a strictly task based assessment. Task based assessment is not permitted in split-shift cases under the regulations.

27. The ALJ did rule in Ms. G.'s favor based on the merits of the case, citing, among other reasons, that the Agency failed to show any new development or mistake under *Mayer* that would justify a reduction in services. See Decision p.11, Exh. F, p. 4. The Decision

states: "At the hearing, Dr. Prunier testified that ***a mistake must have been made***, but did not address his prior conclusion that the Appellant should receive split-shift continuous care." *Id.* (emphasis added).

28. Notwithstanding the fact that Ms. G. had aid-continuing and won the hearing, the proposed reduction placed this client at great risk, especially in light of the fact that the conflicting notices made it quite difficult to understand whether care was being reduced or continued at the split-shift level.

29. Although the State reversed the City's determinations in Ms. Serrano's case, and Ms. G.'s case, see, Exh. E, p. 5, Exh. F, p.5, as, upon information and belief, it has done in virtually all of the hearings challenging reductions of split-shift care over the last several months, these individuals are forced to suffer from the stress of a threatened service reduction and the added burden of preparing for and attending their hearings. Those others who are not getting to hearings are suffering reductions of care that jeopardize their health and safety or force them into segregated institutional settings. It is for these reasons that plaintiffs request immediate injunctive relief.

Dated: May 10, 2012
New York, N.Y.

Leslie Salzman